

AUG 18 1977

MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**

October Term, 1977  
No. 77-2

WILLIAM C. WAGGONER, JOHN L. CONNOLLY, HOWARD C. DENNIS, WILLIAM SCHMIDT, and (as successors-in-interest to C. WILLIAM BURKE, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MEIR, JAMES J. KIRST, WILLIAM JERECZEK and E. J. STRECKER) FRANK L. TODD, FREEMAN M. ROBERTS, DALE I. VAWTER, WILLIAM A. COBB, JR., JOHN BEBEK, JERALD B. LAIRD, JOHN C. MAXWELL and ALEXANDER RADOS, as *Trustees of the Operating Engineers Health and Welfare Fund*; JOHN L. CONNOLLY, WILLIAM C. WAGGONER, C. V. HOLDER, HOWARD C. DENNIS, JAMES J. KIRST, JOHN C. MAXWELL, and (as successors-in-interest of JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, A. FRED HARRISON, WILLIAM JERECZEK, E. J. STRECKER, DONALD E. MEIR, and C. WILLIAM BURKE) FRANK L. TODD, FREEMAN M. ROBERTS, DALE I. VAWTER, WILLIAM A. COBB, JR., JOHN BEBEK, and KENNETH J. BOURGUIGNON, as *Trustees of the Operating Engineers Pension Trust*; WILLIAM C. WAGGONER, HOWARD C. DENNIS, C.I.T. JOHNSON, JAMES J. KIRST, ALEXANDER RADOS, and (as successors-in-interest of JOSEPH H. SEYMOUR, RICHARD L. CORBIT, C. WILLIAM BURKE, HAROLD EDWARDS, DONALD E. MEIR, WILLIAM JERECZEK and E. J. STRECKER) FRANK L. TODD, FREEMAN M. ROBERTS, DALE I. VAWTER, WILLIAM A. COBB, JR., JOHN BEBEK and JERALD B. LAIRD, as *Trustees of the Operating Engineers Vacation-Holiday Savings Trust*; WILLIAM SCHMIDT, HOWARD C. DENNIS, C.I.T. JOHNSON, ALEXANDER RADOS, and (as successors-in-interest of JOSEPH H. SEYMOUR, RICHARD L. CORBIT, KENNETH DOTY, WILLIAM JERECZEK, ROBERT R. MOODIE, ALLAN ROBERTS, RICHARD GANNON and JERRY TRENT) DALE I. VAWTER, FRANK L. TODD, WILLIAM C. WAGGONER, FREEMAN M. ROBERTS, VERNE W. DAHNKE, WILLIAM A. FLOYD, ROBERT LYTTLE and JOHN BEBEK, as *Trustees of the Southern California Operating Engineers Apprentice Training Trust*;

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12; *Petitioners*,

vs.

GRIFFITH COMPANY; J. W. NICKS CONSTRUCTION CO., SECURITY PAVING CO., INC.; *Respondents*,

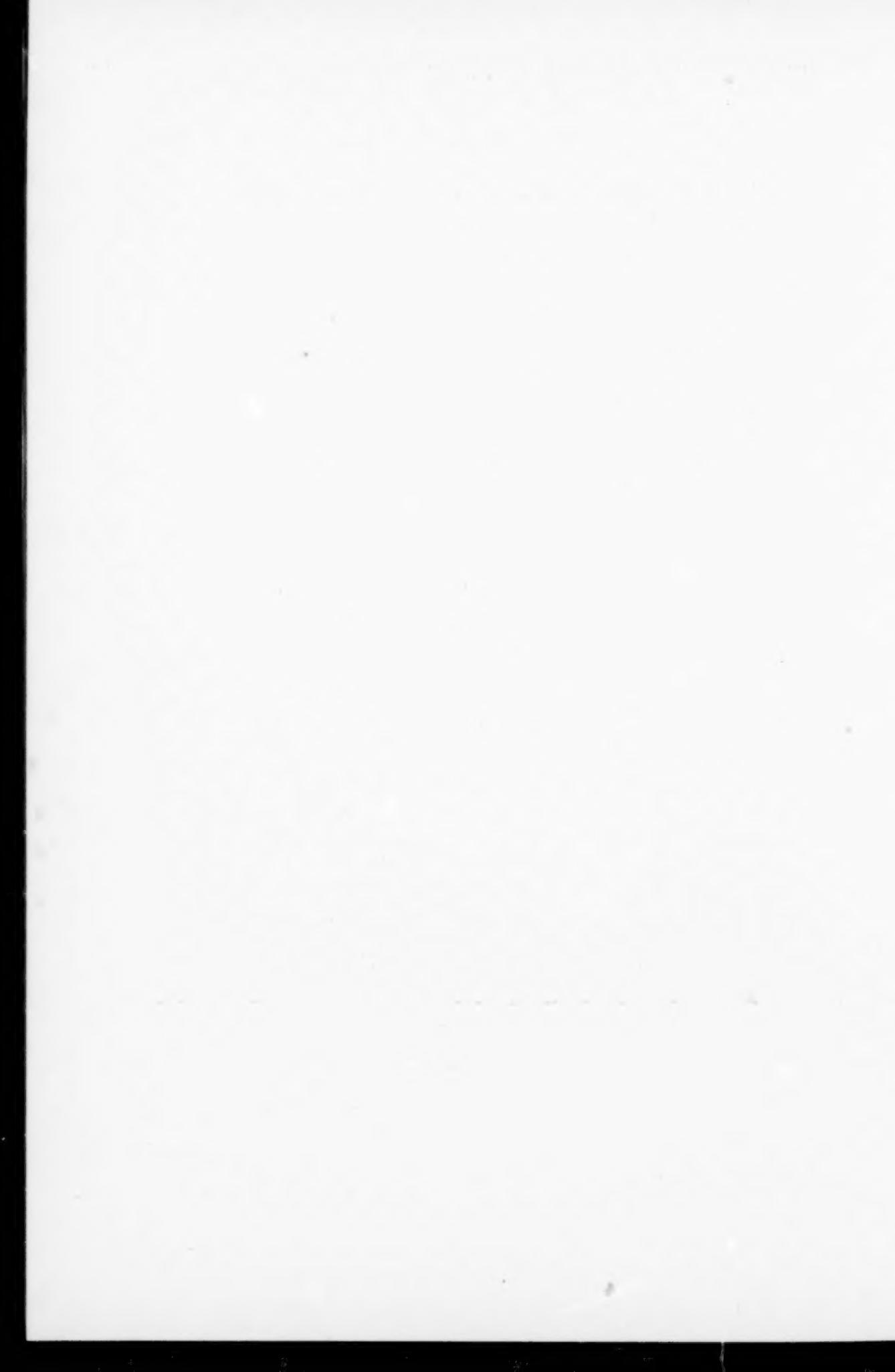
and

NATIONAL LABOR RELATIONS BOARD; *Respondents*.

**On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit.**

**PETITIONERS' REPLY BRIEF.**

WAYNE JETT,  
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*Counsel for Trustees*  
*Special Counsel for Local 12.*



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**PETITIONERS' REPLY BRIEF.**

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Petitioners (the Trustees and Local 12) file this reply brief to address an argument first raised in the respondent employers' brief in opposition.

The employers assert (Br. Op., pp. 8-9) as a reason for denying the writ that "the order below is non-final."<sup>1</sup> To the contrary, however, the decision of the National Labor Relations Board to dismiss the complaint fully disposed of the case by determining the disputed clauses to be primary and lawful. Had the court of appeals not erred (1) in formulating "new" legal rules for testing the primary-secondary nature of such agreements and (2) in usurping the Board's role by applying the rules to the evidence, the case would have been finally ended by affirmance of the Board's decision. Thus, the "remaining issues" for decision by the Board became relevant only as a consequence of the court of appeals' errors, and the case can be finally ended by the review of this Court.

If review is not granted by this Court, upon remand the Board would regard the court of appeals' decision as the law of the case. *Long Lake Lumber Co.*, 169 NLRB 148 (1968). The legal standards and the interpretation of evidence fashioned by the court of appeals would bind the future course of the case through further administrative hearings, administrative law judge decisions and Board decisions, before further review by courts of appeals. Concededly, after those future years of litigation, the Court could then grant review of

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<sup>1</sup>This assertion reaches only the first issue presented by the petition, and does not reach the second and third issues.

"all substantial federal questions raised in earlier stages of litigation", *Mercer v. Theriot*, 377 U.S. 152, 84 S.Ct. 1157 (1964). Protracted and wasteful delay in resolving the potentially dispositive substantive issue in the case, however, is inconsistent with the basic procedural goal of resolving disputes with reasonable dispatch, and has been sharply criticized by scholarly authority. See 1B *Moore's Federal Practice* ¶0.404 [5.-1].

This Court has often granted certiorari to protect the Board's role from usurpation by a court of appeals, as in the case of *South Prairie Construction Co. v. Local No. 627, I.U.O.E.*, 425 U.S. 800, 96 S.Ct. 1842, 1845 (1976).<sup>2</sup> Review of such cases is particularly appropriate where, as in this case, the court of appeals has made errors on substantive issues of national concern. See *N.L.R.B. v. Enterprise Association*, U.S. ...., 97 S.Ct. 891, 905 (1977).

Granting of the petition will enable this Court to:

- (1) Correct the court of appeals' important distortion of the law of secondary boycotts as related particularly to the vital interests of multiemployer employee benefit trusts;
- (2) Approve a "necessary and commendable" mechanism designed in collective bargaining to protect the economic interests of each employee participating in Taft-Hartley multiemployer

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<sup>2</sup>The *South Prairie* case was inappropriately cited in the opposing brief as authority for refusing to grant certiorari. In *South Prairie*, certiorari was granted in order to relieve the Board of the court of appeals' mandate of the appropriate bargaining unit, even though the court of appeals' other rulings refusing enforcement of the Board decision were affirmed by this Court.

fringe benefit trusts by improving the collectibility of delinquent employer contributions;

- (3) Protect the Board's role of interpreting evidence in view of announced legal standards from usurpation by the court of appeals;
- (4) Relieve the Trustees of both the prospect and the reality of multiple suits by and against contributing employers testing the lawfulness and enforceability of the disputed clauses; and
- (5) Relieve the Board, the courts of appeals, this Court and the parties of future years of wasteful litigation.

**Conclusion.**

Based upon the foregoing and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

August, 1977.

Respectfully submitted,

**WAYNE JETT,**

*Counsel for Trustees*

*Special Counsel for Local 12.*